No. 03-1027

In The

United States Supreme Court

DONALD RUMSFELD, SECRETARY OF DEFENSE,
Petitioner,

v.

JOSE PADILLA AND DONNA NEWMAN, AS NEXT FRIEND OF JOSE PADILLA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL LAW, CENTER FOR CONSTITUTIONAL RIGHTS, AND NATIONAL LAWYERS GUILD IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici curiae submit this brief in support of Respondent Jose Padilla, with the written consent of the parties.[1] As listed in the Appendix, *amici* include professors of constitutional law, the Center for Constitutional Rights, and the National Lawyers Guild.

SUMMARY OF ARGUMENT

The military has subjected Jose Padilla—an American citizen arrested on American soil—to prolonged and indefinite incommunicado detention as an enemy combatant, without due process of law or any of the other procedural protections that are guaranteed under the United States Constitution to civilian detainees. Its action is wholly unprecedented. Not only is there no constitutional, statutory, or common law basis for this detention, but the Executive's exercise of its newly asserted powers is proscribed by Congressional legislation that expressly bars such detention. In enacting the Non-Detention Act of 1971, 18 U.S.C. § 4001(a) (2000), Congress reaffirmed the body politic's determination never again to repeat the shame of the military internment of 110,000 individuals of Japanese ancestry—70,000 of whom were American citizens—during World War II. Neither the Joint Resolution of September 18, 2001, Authorization for Use of Military Force, Pub L. No. 107-40, 115 Stat. 224 (hereinafter "Joint Resolution"), the Department of Defense Authorization Act of 1985, 10

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[1] Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

U.S.C. § 956(5) (2000), this Court's decision in *Ex parte Quirin,* 317 U.S. 1 (1942), nor the law of war can overcome Congress's clear proscription against the President's use of his Commander-in-Chief powers to detain United States citizens in the domestic arena, far from active combat. The Non-Detention Act, this Court's rulings and the separation of powers doctrine on which our democracy rests preclude the Executive's use of asserted war powers within the United States to deprive citizens of their fundamental right to personal liberty.

ARGUMENT

I. SEPARATION OF POWERS PRECLUDES THE PRESIDENT FROM USING HIS COMMANDER-IN-CHIEF POWERS TO DETAIN JOSE PADILLA AS AN ENEMY COMBATANT IN THE FACE OF CONGRESS'S EXPRESS PROHIBITION IN THE NON-DETENTION ACT, 18 U.S.C. § 4001(a)

This case is governed by the framework set forth in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). Where the President takes "measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* at 637-38 (Jackson, J., concurring). Here, the President has acted in contravention of the Non-Detention Act, 18 U.S.C. § 4001(a), which precludes the President from using his Commander-in-Chief powers derived from a declaration of

war or authorization to use military force to detain an American citizen seized in the United States absent explicit Congressional authorization. Congress clearly had the constitutional authority to enact this statute.

A. The Non-Detention Act Precludes Both Civilian and Military Detentions of Citizens During Wartime Without Congressional Authorization

In 1971, Congress passed the Non-Detention Act, 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." This text is unambiguous and permits no exceptions to its proscription against executive detentions that are not specifically authorized by statute. *See Desert Palace Inc. v. Costa*, 539 U.S. 90, 93-94 (2003). ("Where . . . [a] statute's words are unambiguous the judicial inquiry is complete.") In directing its prohibition to "the United States" and not any particular civil or military authority acting in its name, the text makes clear its universal application. One choosing to consult its legislative history, moreover, would find the sweeping and universal character of this explicit prohibition fully supported. The legislative history of § 4001(a) reflects Congress's clear intent to deprive the Executive of authority to detain American citizens without explicit statutory authorization during wartime.

The Non-Detention Act was enacted specifically to ensure that the internment of Japanese-Americans following the bombing of Pearl Harbor would not be repeated. Section § 4001(a) had its origins as an amendment to H.R. 234, 92nd Cong. (1971). The purpose of that bill was, as an initial matter, "to repeal the Emergency Detention Act of 1950"

(hereinafter "EDA"). H.R. Rep. No. 92-116, at 2 (1971).[2] Under the EDA, the Executive was authorized in time of war or national emergency to detain persons as "to whom there is reasonable cause to believe will engage in acts of espionage or of sabotage."[3] Internal Security Act of 1950, Pub L. No. 831, 81st Cong. 2d Sess. (Sep. 23, 1950) at § 103, reprinted in H.R. Rep. No. 92-116 at p. 9. The House Judiciary Committee recognized, however, that:

> it is not enough to merely repeal the Detention Act. . . . Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority. It has been suggested that repeal alone would leave us where we were prior to 1950. The Committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists.

H.R. Rep. No. 92-116 at 5. Congress was concerned that the mere repeal of the EDA would result in Congressional silence on the power of the Executive to detain during wartime – and that, out of this legislative vacuum, the courts might imply executive detention powers over citizens in the

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[2] For example, a precursor bill that the Senate passed in 1970, S. 1872, 91st Cong. (1969), simply would have repealed the EDA. S. Rep. No. 91-632 (1969).

[3] The legislative findings preceding the Act stated that a "world Communist movement," organized on a conspiratorial basis, and with the support of the most powerful enemy nation of the United States, had sent agents to enter the United States and engage in "treachery . . . espionage, sabotage, [and] terrorism." Internal Security Act of 1950, Pub L. No. 831 (Sep. 23, 1950) at § 101(1).

next war, under the President's Commander-in-Chief powers. If such a case were to arise, a future President might assert that a wartime detention of American citizens fell into the second part in the framework articulated by Justice Jackson in the *Youngstown* case, where the distribution of power between the President and Congress is "uncertain." 343 U.S. 579, 637 (1952).

To address this concern, Congressman Railsback introduced an amendment to H.R. 234, to "do something affirmatively, other than just the repeal, to make sure that we have restricted the President's *wartime powers*." *Prohibiting Detention Camps: Hearings on H.R. 234 and Other Bills Prohibiting Detention Camps Before the House Comm. on the Judiciary*, 92nd Cong., 1st Sess. 79 (1971) (hereinafter "Hearings") (emphasis added). *See North Haven Bd. of Education v. Bell*, 456 U.S. 512, 526-27 (1982) ("remarks . . . of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction."). Both Congressman Railsback and Congressman Ichord, the Chair of the House Internal Security Committee and the chief opponent of the Railsback Amendment—which eventually passed into law as part of the Non-Detention Act of 1971 and is codified at 18 U.S.C. § 4001(a)—agreed that under the framework established by *Youngstown*, the Railsback Amendment would operate to constrain the President's otherwise broad war powers. Congressman Railsback explained that under this Court's analysis in *Youngstown*, "even though a President might have broad war power, they can be limited by acts of Congress." Hearings at 78. Similarly, Congressman Ichord observed that *Youngstown* "teaches that where Congress has acted on a subject within its jurisdiction, sets forth its policy, and asserts its authority, the President might not thereafter act in

a contrary manner." 117 Cong. Rec. 31544 (1971). For Congressman Ichord, as for Congressman Railsback, the amendment that Railsback introduced would, "under the Youngstown Steel case . . . prohibit even the picking up, at the time of a declared war, at a time of an invasion of the United States, a man whom we would have reasonable cause to believe would commit espionage or sabotage." *Id.* at 31549.

The Government therefore demonstrates its disregard for the history of § 4001(a) when it claims that "the explicit purpose [of § 4001(a)] was to repeal the Emergency Detention Act of 1950." Brief for the Petitioner at 45 (hereinafter "Pet. Br."). That purpose was achieved by Section 2(a) of H.R. 234, which "repeals in toto . . . the Emergency Detention Act." H.R. Rep. No. 92-116 at 5. In contrast, § 4001(a), which was contained in Section 1 of H.R. 234, was designed to go further, to ensure that in future wars, whatever wartime power the President had to detain American citizens believed to be spies or saboteurs would be restricted.

Faced with the fact that the Non-Detention Act was clearly intended to apply to executive detentions during wartime, *see Padilla v. Rumsfeld*, 352 F.3d 695, 718-20 (2d Cir. 2003), the Government argues that § 4001(a) applies only to detention by civilian, and not military, authorities. Pet. Br. at 46. The statute's text, however, is directed to "the United States," not civilian authorities. The government does not, and cannot, cite a single statement in the legislative history of § 4001(a) in support of what would amount to a gaping exception to this clear language. Rather, to support the proposition that § 4001(a) applies only to civilian detention, the government resorts to reliance on language in

a report of the House Committee on Internal Security on a *different* bill, one that was offered as an alternative to the Judiciary Committee's H.R. 234 and that failed to be enacted.[4] *See* Pet. Br. at 46 (No. 03-1027) (citing H.R. Rep. No. 91-1599 (1970)). Congress rejected the House Committee on Internal Security's bill, which opposed the outright repeal of the Emergency Detention Act, and would have left an amended EDA in place. That the Government cites only to a House Committee on Internal Security report pertaining to a rejected bill reflects the paucity of support for its position.

The government next argues that the placement of § 4001(a) in the federal code overrides the plain meaning of the statute's text. Pet. Br. at 46. This argument is similarly unavailing. As the Court of Appeals correctly held, "No accepted canon of statutory interpretation permits 'placement' to trump text, especially where, as here, the text is clear and our reading of it is fully supported by the legislative history." *Padilla*, 352 F.3d at 721-22. Section 4001(b) was drafted decades earlier, in a different era, for different reasons. Whatever may have led Congress to

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[4] The government's error in citing the wrong Committee report is compounded by the misleading manner in which it uses the Internal Security Committee Report. The Government states that Congress recognized that the detention of Japanese-American citizens in World War II involved the exercise of civilian authority rather than military authority. Pet. Br. at 46. In fact, the Internal Security Committee's point was that the "impetus" or motivation for the detentions came from civilian concerns and not out of military necessity. In fact the military was clearly involved in carrying out the exclusion and detentions of the Japanese-Americans during World War II. H.R. Rep. No. 91-1599, at 7.

associate §4001(a) with §4001(b) does not bear on the meaning of § 4001(a).[5] *Id.*

Finally, the Government's effort to draw a distinction between civilian and military detention under § 4001(a) must fail because the categories of persons Congress sought to protect under the Non-Detention Act included persons asserted by the President to be wartime saboteurs and spies. This is the very category of persons that the President now claims to have the power to detain militarily as unlawful enemy combatants. But Congress could not have intended to restrict the President's wartime authority to detain American citizens believed to be saboteurs and spies and at the same time permitted him to retain such authority by merely labeling the alleged saboteur or spy as an enemy combatant and detaining them in a military facility rather than a civilian one.

B. Congress Has Not Authorized Padilla's Detention

As the government concedes, no statute explicitly authorizes the detention of American citizens as enemy

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[5] Section § 4001(b) of Title 18 was passed in 1891, a full 80 years before 1971, when § 4001(a) was passed. *See* Act of Mar. 3, 1891, § 4, 26 Stat. 839, 839, as amended by Act of May 14, 1930, § 2, 46 Stat. 325, 325 and Act of June 25, 1948, § 1. The current section heading was amended in 1971 to denote the division between § 4001's subsections as follows: "1971. Act September 25, 1971, substituted the [current] section heading [('Limitation on detention; control of prisons')] for one which read 'Control by Attorney General'; designated existing provisions as subsec. (b); and inserted subsec. (a)." *See* 18 U.S.C.S. § 4001 (2002), History; Ancillary Laws and Directives, Amendments. Section 4001(b) was left unchanged. *See* H.R. Rep. No. 92-116 at 6. Therefore "the language of neighboring provisions," Pet. Br. at 48, is entirely irrelevant to the interpretation of § 4001(a).

combatants. The government contends, however, that the Joint Resolution authorizing the use of force to respond to the attacks of September 11, 2001, Pub L. No. 107-40, 115 Stat. 224, and the statute appropriating funds relating to the detention of prisoners of war, 10 U.S.C. § 956 (2002), implicitly vest the President with the extraordinary executive detention powers being asserted over Padilla.

The government's arguments cannot be reconciled with due process principles. In a similar context, the Supreme Court has explained that the draconian power to deprive citizens of the fundamental right to liberty must be spelled out in clearest of terms:

> We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

Ex Parte Endo, 323 U.S. 283, 300. The Joint Resolution and appropriations statute cited by the government do not contain the clear and unmistakable language authorizing detention that § 4001(a) demands. Moreover, the government's

interpretation of these documents would contravene the central purpose of § 4001(a).

1. The Joint Resolution Does Not Constitute the Explicit Congressional Authorization to Detain American Citizens Required by the Non-Detention Act

Whether or not, in the absence of § 4001(a), the Joint Resolution could support the government's assertion of power to detain Padilla,[6] the language and history of § 4001(a) unequivocally precludes such a result. The central

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[6] Both the timing of the passage of the Joint Resolution—which came just seven days after the attacks—and the Joint Resolution's plain language attest to the fact that Congress intended to restrict its application to those organizations and individuals who participated in the September 11 attacks. The limited discussion surrounding the adoption of the Joint Resolution shows that Congress attempted to limit the use of force it was authorizing in a manner that would preclude its application against Padilla. The text of the resolution authorizes the use of force against only "those nations, organizations or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Joint Resolution. Further, the Congressional Record makes clear that "[t]hose persons, organizations or nations that were not involved in the September 11 attacks are, by definition, outside the scope of this authorization." 147 Cong. Rec. S9949 (daily ed. Oct. 1, 2001) (statement of Sen. Byrd). There was no discussion in Congress of extending the President's power to seize and detain without charge or trial American citizens on American soil. In fact, the Senate deleted a proviso proposed by the White House that would have given the President the authority "to deter and pre-empt any future acts of terrorism or aggression against the United States," demonstrating unequivocally that "[i]t was not the intent of Congress to give the President unbridled authority . . . to wage war against terrorism writ large." *Id.*

purpose of § 4001(a) was to ensure that a declaration of war—or a simple authorization of the use of military force—would not be deemed to provide the President with the authority to detain American citizens without charge or trial, as many tens of thousands of Japanese-American citizens had been detained under President Roosevelt's 1942 Executive Order. Congressman Railsback, who introduced the provision now codified at 18 U.S.C. § 4001(a), explained that the express purpose of the provision was "to try to do something about what occurred in 1942 through President Roosevelt's Executive Order." 117 Cong. Rec. 31550 (1971). Similarly, Congressman Matsunaga, the chief sponsor of H.R. 234, stated that the purpose of § 4001(a) was "to add protective language to existing law in order to prevent a repetition of the type of interference with individual liberty which resulted in the incarceration in American concentration camps during World War II of some 110,000 persons of Japanese ancestry." Hearings at 48. The Second Circuit majority made the observation, which neither the dissent nor the government contested, that "almost every representative who spoke in favor of repeal of the Emergency Detention Act or adoption of the Railsback Amendment or in opposition to other amendments, described the detention of Japanese-American citizens during World War II as the primary motivation for their positions." *Padilla*, 352 F.3d at 720.

If accepted, the Government's argument would lead to the nonsensical conclusion that Congress, in enacting § 4001(a), did not believe that the statute would have precluded the Japanese-American detentions—because the 1941 Declaration of War had provided the requisite Congressional authorization for these detentions. Yet Congress was clear that the enactment of § 4001(a) was

intended to prevent the President from arguing that a Declaration of War gave him the authority to detain American citizens. Certainly, if a declaration of war would not give a future President the authority to repeat President Roosevelt's detention of Japanese-American citizens during World War II, then the much more limited Joint Resolution authorizing President Bush to use force cannot be read to authorize such detentions.

Moreover, the legislative history of § 4001(a) establishes that Congress's purpose in requiring statutory authorization for the detention of citizens was to ensure that citizens would not be detained during wartime without due process and the other procedural protections that are guaranteed under the Constitution to civilian detainees. For Congressman Railsback, H.R. 234 reflected "the intention of the sponsors that we must make clear that the only way a citizen may be detained is in the traditional common law manner—upon probable cause that the detainee has committed a crime against the government." Hearings at 41. Similarly, subcommittee member Congressman Biester supported H.R. 234 because it provided "that no executive authority of this country at any time has the power to detain any person who is a citizen of the United States without the safeguards of the criminal law." *Id.* at 60. Congressman Kastenmeier, the Chairman of the Subcommittee of the Judiciary Committee that drafted the H.R. 234 reported that H.R. 234 would ensure that citizens not "be detained without the benefit of due process, merely by executive fiat." 117 Cong. Rec. 31541 (1971). To Judiciary Committee Chairman Congressman Celler, H.R. 234 "would forbid the imprisonment or detention of citizens by the U.S., except pursuant to legislative authority and due process." *Id.* at 31553. In light of the 1971 Congress's determination to end

the practice of wartime detentions lacking in due process, § 4001(a) must be read as demanding some explicit Congressional determination to override a citizen's due process rights before such rights can be negated. An authorization to use force that does not discuss detention, much less the detention of American citizens, will not suffice.

An examination of the text of § 4001(a) as it was originally proposed also makes clear that Congress intended that this provision require the adoption of a statute explicitly authorizing the detentions of citizens before the Executive could employ this power. H.R. Rep. No. 92-116 at 1. The original proposal provided that "no person shall be committed to imprisonment or otherwise detained except in conformity with the provisions of Title 18." *Id*. The Justice Department objected to the proposed language because it failed to recognize that there was explicit statutory authority for executive detention and incarceration of citizens contained in other titles of the U.S. Code besides Title 18. *Id.* at 4. Rather than attempt to delineate every section of the U.S. Code authorizing executive detention, the Judiciary Committee rewrote the text into its current form, permitting detentions pursuant to an act of Congress, wherever codified. The new language was not designed to change the purpose of the bill, which was to ensure that a citizen not be detained except in accordance with a specific provision of the U.S. Code authorizing such detention. It was simply intended to address the Justice Department's legitimate objection that other provisions of the code besides Title 18 specifically authorized detentions.

Congress's clear purpose in enacting § 4001(a) was to remove whatever wartime authority a President may have

to detain citizens whom he believes to be enemy belligerents in order to prevent a repetition of what happened in 1942. If a declaration of war or a lesser statutory authorization to use force were to be deemed an act of Congress sufficient to meet the statute's requirement for creating authority to detain, the statute's central purpose would be negated. Congress then would have *prohibited* the detention of citizens during times of warfare unless authorized by statute, and concomitantly *permitted* such detentions whenever it authorized warfare. Such an interpretation of § 4001(a) would be contrary to the statute's central purpose and cannot be endorsed. *See, e.g., Kosak v. United States*, 465 U.S. 848, 854 n.9 (1984).

In short, by enacting § 4001(a), Congress expressed a clear public policy against the Executive's detention of citizens, in wartime or in time of peace, even in the case of citizens "likely to engage in espionage or sabotage." H.R. Rep. No. 92-116 at 2. Congress did so at the time of the Vietnam War, when widespread domestic dissent was focused on that war, in the wake of the political assassinations of major political figures, and in the face of domestic terrorism. This Court, in addressing the statute's application, has declared that "the plain language of § 4001(a) prescribes detention *of any kind* by the United States, absent a Congressional grant of authority to detain." *Howe v. United States*, 452 U.S. 473, 480 n.3 (1981) (emphasis in original). Nothing in the legislative history § 4001(a), its text, or its subsequent construction by the courts indicates that its clear proscription can be ignored here.

2. The Department of Defense Authorization Act of 1985, 10 U.S.C. § 956(5), Does Not Constitute the Explicit Congressional Authorization to Detain Citizens Required by the Non-Detention Act

For similar reasons, the government's reliance on an appropriations statute provides no support for the executive branch's creation of a new classification of "enemy combatant." Section 956(5) specifies that it is intended to appropriate funds for "the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the [military] whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of the [military] pursuant to Presidential proclamation." 10 U.S.C. § 956(5) (2002). Nothing in the text of this appropriations statute implies an expanded delegation of detention powers from Congress to the President. On its face, § 956(5) refers only to expenditures. *See Padilla*, 352 F.3d at 724. In addition, the principle is clear from nearly fifty years of this Court's jurisprudence that appropriations bills cannot be interpreted as amending substantive law absent manifest Congressional intent to do so. *See*, *e.g.*, *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992).

Finally, in *Endo*, this Court categorically rejected the same argument that the Executive propounds here—namely, that Congress may use an appropriations act to ratify a power that it had the authority to grant in the first instance. In *Endo*, the Executive contended that an appropriations statute funding the War Relocation Authority ratified the Authority's power to detain Japanese-Americans. The Court noted that in order for such a ratification to operate it had to:

> plainly show a purpose to bestow the precise authority which is claimed. We can hardly deduce such a purpose here where a lump appropriation was made for the overall program of the [War Relocation] Authority and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees [i.e., detainees] without ratifying every phase of the program.

Endo, 323 U.S. at 304 n.24 (citations omitted). Given that Section § 956(5) does not in any way evince Congress's intent to bestow upon the Executive the authority to detain U.S. citizens indefinitely without charge or trial, the appropriations statute cannot be deemed a ratification of the exercise of this power.

II. THE NON-DETENTION ACT'S PRECLUSION OF THE PRESIDENT'S AUTHORITY TO DETAIN PADILLA IS CLEARLY WITHIN THE CONSTITUTIONAL AUTHORITY OF CONGRESS

The Government argues that an interpretation of 18 U.S.C. § 4001(a) that prohibits Padilla's detention here would raise serious questions as to whether Congress can constrain the basic power to seize and detain enemy combatants in wartime. Pet. Br. at 48. This Court's rulings, and the Constitution's text, have long removed any doubt as to Congress's power to regulate the detention of an American citizen who is seized within the United States, outside of an active theatre of military operations.

A. The Broad Discretion Accorded to the President's Conduct of Military Operations Abroad is Not Accorded to His Actions Addressing Domestic Affairs, Even During Wartime

This Court has long recognized that the distinction between internal and external governmental affairs is a critical factor in determining the scope of the President's constitutional war powers. *Youngstown*, 343 U.S. at 645-46 (Jackson, J., concurring). While great deference is given to the President's authority as Commander-in-Chief to act in external affairs, this Court has never accepted the proposition that the President's Commander-in-Chief authority, standing alone, may be turned inward to intrude upon domestic affairs, even in times of national security threats or undeclared wars. *See Youngstown*, 343 U.S. at 642 (Jackson, J., concurring); *see also id.* at 632 (Douglas, J., concurring) ("[O]ur history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs."); *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring) (reasoning that "[i]n *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact," and that in *Curtis-Wright*, the effect of the President's action was "entirely external to the United States and [falls] within the category of foreign affairs.").

The President's military powers were never intended "to supercede representative government of internal affairs," a proposition that Justice Jackson found "obvious from the Constitution and from elementary American history." *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring). *See also Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814)

(holding that the President could not seize, as enemy property, material found on U.S. land at the commencement of hostilities in 1812 without Congressional authority); *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850) (finding that the President, as Commander-in-Chief, could not annex territory to the United States by virtue of a military conquest unless he received authority from Congress); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866) (military commissions cannot be justified "on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is no unwritten criminal code to which resort can be had as a source of jurisdiction"). In this regard, Justice Jackson declared in *Youngstown* that "no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed force to some foreign venture." *Youngstown*, 343 U.S. at 642. *See also id.* at 644.

It is beyond question that Congress has the constitutional power to regulate the detention of American citizens who are captured within the United States during time of war or military conflict. The Constitution does not limit Congress's war powers to the authorization or declaration of war; rather, it explicitly provides Congress with a panoply of war powers including: (i) the power to "make Rules concerning Captures on Land and Water," U.S. Const. Art. I, § 8, cl. 11; (ii) the sole authority to authorize the seizure of citizens' homes for military purposes during times of war, U.S. Const. Amend. III; and (iii) the exclusive power to authorize the seizure of enemy property within the

United States during wartime. *Brown v. United States*, 12 U.S. at 115-16. Indeed, the Supreme Court, early in its history, affirmed a Congressional statute which limited the President's power during wartime to seize ships on the high seas that were thought to be aiding the enemy. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (finding that Presidential Order did not make seizures legal). If Congress has the authority to limit the President's Commander-in-Chief power to capture ships on the high seas during a time of military conflict, it certainly must have the constitutional authority to limit the President's power to detain American citizens in the United States during wartime.[7] The Government's attempt to raise constitutional doubts as to Congress's power to preclude Padilla's detention without process is spurious.

B. The Plain Meaning of the Non-Detention Act is Consistent With the Limits this Court Has Placed on the Commander-in-Chief's Power to Detain American Citizens

The government argues that the Court of Appeals interpretation of § 4001(a)'s plain meaning cannot stand because it "would preclude the military's detention even of

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[7] Moreover, an early Congress asserted its authority to regulate the President's detentions of prisoners of war even outside of the United States. The Twelfth Congress passed statutes authorizing and regulating the President's detention of Prisoners of War during the War of 1812, and appropriating funds for that specific purpose. *See An Act for the safe keeping and accommodation of prisoners of war*, 2 Stat. 777, 12th Cong., 1st Sess. (1812); *see also An Act concerning Letters of Marque, Prizes, and Prize Goods*, 2 Stat. 759, 12th Cong., 1st Sess., § 7 (1812) (regulating custody and safekeeping of prisoners captured on prize vessels by ships operating under executive commission, and safekeeping and support in subsequent custody of United States marshals).

an American citizen seized while fighting for the enemy in the heat of traditional battlefield combat." Pet. Br. at 48. As an initial matter, this overlooks the fact that an Act of Congress already provides for criminal charges for citizens seized while fighting for the enemy—the treason statute, 18 U.S.C. 2381 ("Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, . . . within the United States or elsewhere, is guilty of treason . . ."). However, the case at hand does not require the Court to determine the outer limits of Congressional power, since Padilla was, of course, not "seized while fighting for the enemy in the heat of traditional battlefield combat." Moreover, the statute's plain meaning does not require the result the Government suggests.

The plain meaning of the statute is that Congress meant to exercise the full extent of its Constitutional power to preclude the executive detentions of American citizens during war or other national emergencies without statutory authorization. Congress explicitly recognized the Constitutional framework provided by *Youngstown*, and intended to occupy the field by precluding executive detentions. "Even though a President might have broad war powers, they can be limited by acts of Congress." Hearings at 78 (statement of Rep. Railsback); *see also* 117 Cong. Rec. 31551 (1971) (statement of Rep. Railsback). Congress also recognized that the president had exercised a common-law power to detain prisoners during the conduct of war—a power which they understood to be limited to "the theater of active military operations," "confined to the locality of actual war"—and intended to leave that power undisturbed. Hearings at 41; *see also* 117 Cong. Rec. 31570 (1971) (statement of Congressman Seiberling). Therefore, unless "Courts are actually closed, and it is impossible to administer

criminal justice according to law," analogous to a domestic battlefield situation, § 4001(a)'s prohibition was meant to apply.[8] *Id.; see also id.* at 31551 (statement of Rep. Railsback that there is only one exception under Milligan—"that of impossibility, that is situations calling for martial law"). The statute thus prohibits executive detention unless martial law exists and the civilian courts are closed. Congressman Coughlin expressed Congress's understanding thus:

> In the case of invasion or insurrection, the President has the power to proclaim martial law and take extraordinary measures to maintain order. There is no argument, to my knowledge, that the President should not possess such power.
>
> The bill simply says that in the absence of a martial law situation and when the courts are functioning, then we should use the judicial process.

117 Cong. Rec. 31777.

The President claims, however, that in the war against Al Qaeda, the battlefield is everywhere, including Chicago. Congress rejected that argument in 1971. First, many Representatives cited *Milligan* and used its language

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[8] This case obviously does not raise any question of whether Padilla was detained where "the courts are actually closed" and martial law applies. The *Hamdi* case does raise the issue, not involved here, of whether a citizen seized in an active theater of military operations can be detained in the United States for many years thereafter without being charged with or tried for committing a crime, such as treason.

of active military operations where the courts are closed to describe where they thought their authority to proscribe detentions ended. *See* Hearings at 40-41 (statement of Rep. Railsback); 117 Cong. Rec. 31551 (1971) (statement of Rep. Railsback); *id*. at 31570 (statement of Rep. Abzug); *id.* at 31779 (statement of Reps. Drinan and Pepper); Hearings at 45 (statement of Rep. Matsunaga); *id*. at 63 (statement of Rep. Anderson). They therefore intended that the plain meaning of the statute apply except where "impossibility" prevented its application. Hearings at 41 (statement of Rep. Railsback); 117 Cong. Rec. 31570 (1971) (statement of Rep. Abzug). Moreover, Congress was fully aware of the total war, global battlefield argument, and explicitly rejected it. The situation Congress explicitly addressed—the detention of Japanese-American citizens during World War II—involved almost precisely the same executive argument made here. There too, U.S. territory had been attacked and military officials believed that further attacks on the West Coast might be imminent; there too, the President and his military commanders claimed that "military necessity" justified the detentions. Congress's indisputable intent to ensure that such detentions never happen again precludes the argument the government makes here that the statute should be read to permit a broad battlefield exemption extending throughout the United States even in the absence of active military operations.

The Congressional reading of the implied limits to its power to preclude the Executive from detaining American citizens comports with this Court's reading of what constitutes a battleground. *See Milligan*, 71 U.S. at 121 (the laws and usages of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process

unobstructed"). In addition to *Milligan*, this Court more recently in *Youngstown* used the language of "day to day fighting in a theatre of war" to determine that the United States was not a battleground to which President Truman would have been able to issue an executive order to seize and operate steel mills. *Youngstown*, 343 U.S. at 587. Five years later in *Reid v. Covert*, Justice Black's opinion held that the military power to try American citizens in tribunals only extended to "an area of actual fighting." 354 U.S. 1, 33-35 (1957). Padilla's detention does not meet that standard.

C. *Quirin* Does Not Support the Executive's Claim of Authority to Detain Citizens Indefinitely Without Any Process by Labeling Them Enemy Combatants

The Government relies heavily on this Court's opinion in *Quirin*, 317 U.S. 1 (1942) as authority for its power to detain Padilla as an enemy combatant and its reading of 18 U.S.C. § 4001(a) as not applicable to this case. *Quirin* provides no such support.

Quirin decided the question of whether "admitted enemy invaders" could be detained "for trial by Military Commission", pursuant to Congressional authorization for such a trial. 317 U.S. at 47; *see also id*. at 18, 29. Here, by contrast, the Government seeks to indefinitely detain without charge or trial a citizen who has never admitted to being an "enemy invader" or belligerent, in the face of a Congressional statute whose plain text forbids such detention.

1. *Quirin* Involved Detention for Trial, Not Detention Without Process

The Government inaccurately claims that "the issue in Quirin was not merely whether the military had jurisdiction to try the saboteurs for violating the laws of war, but whether the military had the authority to detain them in the first place." Pet. Br. at 33. Chief Justice Stone's opinion posed as the "question for decision . . . whether the detention of petitioners by respondent *for trial* by Military Commission . . . is in conformity to the laws and Constitution of the United States." 317 U.S. at 18 (emphasis added). The question of whether an indefinite detention without trial of a citizen who had never been charged with any violation of the laws of war or any criminal statute was lawful was not presented in that case. While the Court did state that unlawful combatants were generally subject to both detention and trial, the question of whether a citizen could be detained, and never charged or tried, simply by a Presidential designation that he was an unlawful combatant was never at issue. Indeed, the Court was careful to frame the issue as detention for trial, or detention and trial, not detention without trial, as is the case here.

This case thus raises very different and far graver constitutional concerns than did *Quirin*. The *Quirin* petitioners were tried and eventually judged to be enemy combatants guilty of violations of the laws of war; the question was the adequacy of the process by which they had been tried. Padilla, by contrast, has been imprisoned for almost two years without any process to determine whether he is indeed an enemy combatant or a wrongfully detained

civilian, and whether he is guilty of any violation whatsoever.

2. The *Quirin* Petitioners Admitted That They Were Enemy Combatants

In *Quirin*, the petitioners admitted that they were enemy combatants. 317 U.S. at 20-23. The *Quirin* Court therefore distinguished *Milligan*'s holding that civilians could not be tried before military tribunals except in times of martial law where the courts were closed because the petitioners, "upon the conceded facts, were plainly within those boundaries" of the jurisdiction of military tribunals. *Id.* at 46. The *Milligan* Court "had no occasion" to decide the more troubling question of whether an American citizen who claims to be a civilian and not an enemy combatant can nevertheless be subject to the jurisdiction of a military trial. *Id.* at 45.

The Constitution and 18 U.S.C. § 4001(a) forbid the imprisonment of American citizens without the safeguards of due process. The *Quirin* Court was obviously concerned that the Executive not be able to discard those safeguards simply by labeling a person an enemy combatant. It therefore held narrowly on the facts of that case that admitted enemy combatants could be tried by military commission where Congress had so provided. It is an impermissiable extension of the holding in *Quirin* that a citizen who claims to be a civilian and not an enemy combatant can be detained without trial or notice of charges based on no more than the President's determination that he is an enemy combatant.

3. The *Quirin* Court Held That Congress Had Authorized the Military Commissions at Issue in That Case

As the Court of Appeals correctly held, the *Quirin* Court declined to determine whether the President had any broad Commander-in-Chief power to try suspected spies before military commissions "without the support of Congressional legislation." 317 U.S. at 29. In *Quirin*, "Congress had authorized trial of offenses against the law of war before such commissions." *Id*. Here, by contrast, as the Court of Appeals held, Congress has expressly disapproved the detention of American citizens by the Executive without due process and pursuant to some explicit statutory authority.

The Government argues that the same Articles of War involved in *Quirin* are currently codified as Article 21 of the Uniform Code of Military Justice. Pet. Br. at p 33. But the Government is not proceeding pursuant to that Article in Jose Padilla's case. Rather, it is proceeding on the President's Commander-in-Chief power stemming from the Joint Resolution. It is precisely that authority that is precluded by 18 U.S.C. § 4001(a).

In sum, nothing in this Court's decision in *Quirin* calls into question the constitutionality of § 4001(a) in proscribing the executive detention of Padilla.

CONCLUSION

For the reasons stated herein, the decision of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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April 9, 2004

APPENDIX

AMICI STATEMENTS OF INTEREST

Bruce A. Ackerman is Sterling Professor of Law and Political Science at Yale University. He is an internationally renowned expert on constitutional law, and has published widely and testified before numerous Congressional committees on constitutional history and structure, separation of powers, and civil liberties in times of national crisis.

Erwin Chemerinsky is the Sydney M. Irmas Professor of Law and Political Science at the University of Southern California. Professor Chemerinsky is one of the nation's leading experts in the fields of constitutional law and federal jurisdiction.

Thomas C. Grey is Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law at Stanford Law School, and as a scholar has written extensively on questions of constitutional law.

Sylvia A. Law is Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry, New York University Law School, and a leading expert and litigator in the field of constitutional law and civil liberties.

Martha Minow is William Henry Bloomberg Professor of Law, Harvard Law School and one of the world's leading human rights scholars. She has published widely on the topics of war crimes and special postwar tribunals.

Peter Shane is Joseph S. Platt/Porter Wright Morris & Arthur Professor of Law and Director of the Center for Law,

Policy, and Social Science at Ohio State University. A former Justice Department lawyer, Professor Shane is a constitutional and administrative law scholar and the author of casebooks in both separation of powers and administrative law.

Geoffrey R. Stone is the Harry Kalven, Jr. Distinguished Service Professor of Law at the University of Chicago. He is the former Dean of the University of Chicago Law School and former Provost of the University of Chicago. He was written extensively in the field of constitutional law and is an editor of the Supreme Court Review.

Peter L. Strauss is Betts Professor of Law at Columbia Law School. He served in the office of the Solicitor General from 1968 to 1971 and has chaired the Separation of Powers Committee (among others) of the ABA's Section on Administrative Law and Regulatory Practice.

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The **Center for Constitutional Rights** ("CCR") is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. Founded in 1966 during the Civil Rights Movement, CCR has a long history of litigating cases on behalf of citizens accused of seditious behavior or thought to pose a national security threat during wartime, *see, e.g.*, *United States v. United States District Court*, 407 U.S. 297 (1972). As part of its advocacy on behalf of those whose civil, constitutional and human rights have been violated, CCR represents several British, French, Turkish, Canadian and Australian citizens

detained at Camp Delta in the Guantanamo Bay Naval Station. *See Rasul v. Bush,* 215 F. Supp.2d 55 (D.D.C. 2002), *aff'd sub nom. Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (Nov. 10, 2003).

The **National Lawyers Guild** is a national non-profit legal and political organization dedicated to using the law as an instrument for social amelioration. Founded in 1937 as an alternative to the then-racially segregated American Bar Association, the Guild has a long history of representing individuals who the government has deemed a threat to national security. The Guild represented the Hollywood Ten, the Rosenbergs, and thousands of individuals targeted by the House Un-American Activities Committee. Guild members argued *United States v. United States District Court*, the Supreme Court case that established that Richard Nixon could not ignore the Bill of Rights in the name of national security and led to the Watergate hearings and Nixon's resignation. Guild members defended FBI-targeted members of the Black Panther Party, the American Indian Movement, the Puerto Rican independence movement and helped expose illegal FBI and CIA surveillance, infiltration and disruption tactics (COINTELPRO) that the U.S. Senate "Church Commission" hearings detailed in 1975-76 and which led to enactment of the Freedom of Information Act and other specific limitations on federal investigative power.